

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	15.12.2021
DELIVERED ON	23.12.2021

CORAM:

THE HONOURABLE Mr. JUSTICE P.N. PRAKASH
AND
THE HONOURABLE Mrs. JUSTICE R. HEMALATHA

Crl.A. No.496 of 2021

Union of India
represented by
the Inspector of Police
National Investigation Agency
Chennai
RC No.08/2021/NIA/DLI

Appellant/Complainant

Vs.

Mohammed Iqbal @ Senthil Kumar

Respondent/Accused

Criminal Appeal filed under Section 21 of the National Investigation Agency Act seeking to set aside the order dated 15.09.2021 passed in Crl.M.P. No.207 of 2021 on the file of the Special Court for NIA Act Cases, Poonamallee and direct the Director, Tamil Nadu Forensic Sciences Department (TNFSD), Kamarajar Salai, Chennai, to take necessary steps for obtaining voice samples of accused person, the respondent herein, for comparison of the same with the questioned / disputed voice of the respondent herein.

For appellant Mr. R. Karthikeyan
Special Public Prosecutor for NIA Act Cases

For respondent Mr.S.M.A. Jinnah

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J U D G M E N T

P.N. PRAKASH, J.

Mohammed Iqbal @ Senthil Kumar, the respondent herein, is said to have posted certain offensive materials in his Facebook account denigrating Hindus and instigating Muslims to unleash violence against Hindus. The police took note of this and

registered a case in C1, Thideer Nagar P.S. Cr.No.971/2020 under Sections 153-A, 153B, 505(1)(b), 505(1)(c) and 505(2) of IPC and Section 13(1)(b) of the Unlawful Activities (Prevention) Act, 1967 (for brevity "the UAP Act") against him on 01.12.2020 and arrested him the next day, i.e., 02.12.2020. Based on his confession, a mobile phone was seized and the same was sent to the Forensic Sciences Department for analysis.

2. On 20.04.2021, the Government of India entrusted the case to the NIA and accordingly, the NIA took over the investigation of the case from the State police on 26.04.2021 and re-registered the FIR as FIR No.RC-08/2021/NIA/DLI under the aforesaid provisions.

3. On 25.05.2021, the NIA received the forensic report from the Tamil Nadu Forensic Sciences Department and on perusal of it, it came to light that the seized mobile phone contained audio files/voice clips allegedly containing the voice of Mohammed Iqbal advocating re-establishment of the Islamic state caliphate or Khilafah and for implementing sharia globally. The voice clips also were found to contain speeches denigrating the judicial system in India and other democratic institutions.

4. Therefore, the NIA filed an application dated 27.05.2021 in the trial Court (Special Court for NIA Act Cases, Chennai) placing reliance on the judgment of the Supreme Court in Ritesh Sinha Vs. State of Uttar Pradesh & another [(2019) 8 SCC 1] and prayed for a direction to obtain the voice exemplar of Mohammed Iqbal for comparison with the ones found in the mobile phone. This petition was numbered by the Special Court as CrI.M.P.No.207 of 2021. However, on the next day i.e., on 28.05.2021, the NIA filed a charge sheet against Mohammed Iqbal for the offences under Sections 120-B IPC read with 124-A, 153-A, 153-B, 505(1)(b), 505(1)(c) and 505(2) IPC and Sections 13(1)(b), 38 & 39 UAP Act. On the same day, i.e., on 28.05.2021, the NIA filed a further application in CrI.M.P.No.212 of 2021 under Section 173(8) Cr.P.C. for conducting further investigation against some suspects viz., Mannai Bava, Shaik Allaudin, Immamudeen, Zaheer Hussain, Abdul Sathar, Shahul Hameed, who were supposed to be members of the organisation viz., Hizbut-Tahrir. By order dated 27.07.2021, the trial Court allowed the petition in CrI.M.P.No.212 of 2021 that was filed by the NIA for further investigation under Section 173(8) Cr.P.C. Mohammed Iqbal filed CrI.M.P.No.222 of 2021, for bail, which was allowed by the trial Court on 03.09.2021 and accordingly, he was

released on bail. The trial Court took up CrI.M.P.No.207 of 2021 that was filed by the NIA, for a direction to Mohammed Iqbal to give his voice exemplar, for enquiry and by order dated 15.09.2021, dismissed the same, aggrieved by which, the NIA has preferred the instant appeal under Section 21 of the NIA Act.

5. Heard Mr.R.Karthikeyan, learned Special Public Prosecutor for NIA Act cases and Mr.S.M.A.Jinnah, learned counsel for Mohammed Iqbal.

6. This Court gave its anxious consideration to the rival submissions.

7. From a reading of paragraph No.10 of the impugned order, it is clear that the learned trial Judge was aware of the law laid down by the Supreme Court in Ritesh Sinha (supra), wherein the Supreme Court has held that the Court having magisterial powers can direct the accused to give his voice exemplar for the purpose of comparison and that it would not offend Article 20(3) of the Constitution of India. Therefore, Mr.Jinnah's argument that giving of voice exemplar would be violative under Article 20(3) of the Constitution of India, cannot be countenanced. The trial Court has castigated the NIA, for filing the final report (charge sheet) on 28.05.2021, without waiting for the voice analysis report. This is obvious from the following observations of the trial Court in paragraph No.17 of the impugned order :

"17. It is not an out of place to discuss about the conduct of the NIA that the said suspected cell phone has been seized from the accused on 02.12.2020 and the same was forwarded to the Tamil Nadu Forensic Sciences Department and received the report on 26.05.2021 and wherein it is stated that "all the retrieved audio files (including Telegram voice messages) and available document files were as such copied onto the above pen drive under specified folders." But, the NIA has not taken any further steps immediately, after getting the said report, for comparing the said audio file along with the voice sample of this accused and hurriedly filed their final report on 28.05.2021, which indicates that the comparison of the voice samples of this accused along with the audio file found in the suspected cell phone is unnecessary to the NIA. From the said conduct of

the NIA, it appears that they are taking a two different view on a particular time. Under the said circumstances, the doctrine of approbate and reprobate is applicable and therefore, the mistake committed by the NIA is appear to be an incurable mistake, since the final report has already been filed and no order for further investigation against this accused is pending. Even though the NIA is stated to be a premier investigating agency with regard to the offences committed against the integrity, security and sovereignty of India, they have to conduct and complete the investigation as early as possible by strictly following the Indian Evidence Act and the Criminal Procedure Code. They have no super power to board the missing flight."

8. We are sad to note that the learned trial Judge has fallen in error in understanding the principles governing investigation and further investigation. The investigation in this case began for the offensive materials that were posted by Mohammed Iqbal in his Facebook account. During the course of investigation, the police stumbled upon a mobile phone from the possession of Mohammed Iqbal, which was sent to the Forensic Sciences Department, for retrieving the data in it. The report from the Forensic Sciences Department was received by the NIA only on 25.05.2021. The report showed damning materials in the form of audio files and video clips stored in the mobile phone. By then, the NIA had completed the investigation qua the Facebook posts and were ready with the charge sheet. When they received the report from the Forensic Sciences Department dated 25.05.2021, they filed a petition in CrI.M.P.No.207 of 2021 on 27.05.2021, requesting the Court to give a direction to Mohammed Iqbal to give his voice exemplar. Since they had already completed the investigation qua Facebook posts, they filed a charge sheet against Mohammed Iqbal for the aforesaid offences on 28.05.2021. The fact that the learned trial Judge had taken cognizance of the offences disclosed in the charge sheet, itself shows that the charge sheet had prima facie materials to proceed further against Mohammed Iqbal.

9. We do not understand, how the doctrine of "approbate and reprobate" could be applied to the present case. This doctrine would clearly apply in litigations between private persons and would not apply to a criminal prosecution, which is essentially predicated on statutory provisions, because, there cannot be an estoppel against a statute. In other words, an undertaking given by an Investigating Officer in a given situation, cannot be used as a rope to eternally bind him by using "approbate-reprobate" doctrine because, the Investigating Officer is

required to perform his duties in accordance with the statutory provisions adumbrated in procedural laws, to circumvent which, he has no authority.

10. In fact, the judgments of the Supreme Court in Vinay Tyagi Vs. Irshad Ali [2013(5) SCC 762] and Vinubhai Haribhai Malaviya and Others Vs. State of Gujarat and Another [2019(17) SCC 1] appear to have been cited at the Bar as these judgments find a place in the impugned order of the trial Court. Had the learned trial Judge carefully read these two judgments, he would not have fallen into such a grievous error. What the NIA was seeking through CrI.M.P.No.207 of 2021 was not leave to conduct further investigation, but, the assistance of the Court, to get the voice exemplar of Mohammed Iqbal, for comparing it with the audio/video clips that were retrieved from the mobile phone that was seized from him, as a measure of gathering more evidence. The evidence so gathered, can either be used as additional evidence to strengthen the charge sheet in C.C.No.2 of 2021 or could also be used for registering a fresh FIR against him. The NIA had to approach the trial Court, for taking the voice exemplar of Mohammed Iqbal because, when the report was received from the Forensic Sciences Department, Mohammed Iqbal was in the judicial custody of the trial Court and was not on bail.

11. To recapitulate, the petition in CrI.M.P.No.207 of 2021 for voice exemplar was filed by the NIA in the Special Court on 27.05.2021 and during the pendency of this petition, the trial Court granted Mohammed Iqbal bail in CrI.M.P.No.222 of 2021 on 03.09.2021 and thereafter, passed orders in CrI.M.P.No.207 of 2021 on 15.09.2021, rejecting the request of the NIA for voice exemplar. The trial Court appears to have lost sight of the legal position that further investigation under Section 173(8) Cr.P.C. can be ordered in a given case, even without an application from the police. In fact, in Amrutbhai Shambhubhai Patel Vs. Sumanbhai Kantibhai Patel [2017(4) SCC 177], a two Judge Bench of the Supreme Court had held that post-cognizance, the Magistrate has no power to suo motu order further investigation and that the same can be done only on the application of the police. This has been specifically overruled by a three Judge Bench of the Supreme Court in Vinubhai Haribhai Malaviya (supra) wherein at paragraph No.42, it has been held as follows :

"42. ... There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h) and Section 173(8) CrPC, as has been noticed hereinabove, and would be available at all stages of the progress

of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case."

(emphasis supplied)

12. In Vinubhai Haribhai Malaviya (supra), the three Judge Bench had affirmed the law in Vinay Tyagi (supra) and has copiously quoted several paragraphs therefrom. In paragraph No.51 of Vinay Tyagi (supra), it has been clearly held as follows :

"... ... In other words, it is the judicial conscience of the Magistrate which has to be satisfied with reference to the record and the documents placed before him by the investigating agency, in coming to the appropriate conclusion in consonance with the principles of law. It will be a travesty of justice, if the court cannot be permitted to direct "further investigation" to clear its doubt and to order the investigating agency to further substantiate its charge-sheet."

supplied)

(emphasis

13. A reading of the above paragraph shows that the investigating agency can be directed to conduct further investigation "to further substantiate its charge sheet." What is the meaning of this, in the context of the present case? On 25.05.2021, the NIA received the forensic report; on 27.05.2021, they filed the petition in CrI.M.P.No.207 of 2021 for voice exemplar; on 28.05.2021, they filed the charge sheet in the case. The judicial conscience of the learned trial Judge ought to have dictated to him that, in this case, obtaining voice exemplar would further substantiate the charge sheet of the NIA. The NIA placed before the learned trial Judge, the forensic report which showed audio/video files containing objectionable materials. The NIA only wanted the aid of the Court to get the voice exemplar for comparison purposes. The final voice exemplar report may turn out to be either way viz., either in favour of Mohammed Iqbal or against him. Instead of acting in accordance with the law laid down by the Supreme Court in

Vinubhai Haribhai Malaviya (supra) and Vinay Tyagi (supra), the learned trial Judge has embarked on an uncereemonious expedition to criticise the NIA with choicy expressions which we do not approve.

14. We are constrained to draw the attention of the learned trial Judge to the following sagely counsel of a Constitution Bench of the Supreme Court in State of U.P. Vs. Mohd. Naim (AIR 1964 SC 703) :

"10. If there is one principle of cardinal importance in the administration of justice, it is this : the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by any body, even by this Court. At the same time it is equally necessary that in expressing their opinions Judges and Magistrates must be guided by considerations of justice, fair-play and restraint. It is not infrequent that sweeping generalisations defeat the very purpose for which they are made. It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct, justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve."

15. The learned trial Judge has held in paragraph No.17 as, "... .. the mistake committed by the NIA is appear to be an incurable mistake, since the final report has already been filed and no order for further investigation against this accused is pending." Further investigation is not always accused-centric. It could also be in search of evidence and materials, which can either, bolster the prosecution case or expose the innocence of the accused named in the charge sheet.

16. For all the aforesaid reasons, the impugned order dated 15.09.2021 passed in CrI.M.P.No.207 of 2021 on the file of the Special Court for NIA Act Cases, Poonamallee, deserves to be set aside and accordingly, the same is set aside. As a sequel, this criminal appeal is allowed and the prayer of the NIA in CrI.M.P.No.207 of 2021, is allowed.

The trial Court is directed to take steps for obtaining the voice exemplar of Mohammed Iqbal, for comparison with the questioned/disputed voice in the audio/video clips found in the data retrieved from the seized mobile phone. Since Mohammed Iqbal is on bail, if he refuses to co-operate, his bail can be cancelled by the trial Court in accordance with law and adverse inference drawn.

Sd/-

Assistant Registrar(CS V)

//True Copy// Sub Assistant Registrar

cad/gya

To

- 1 The Judge
 Special Court for NIA Act Cases
 (Sessions Court for exclusive Trial of Bomb Blast cases)
 Poonamallee.
- 2 The Inspector of Police/C10
 National Investigation Agency, Chennai
- 3 The Director,
 Tamil Nadu Forensic Sciences Department (TNFSD),
 Kamarajar Salai, Chennai
4. The Special Public Prosecutor, (NIA)
 High Court, Madras.
5. The Public Prosecutor
 High Court of Madras, Chennai 600 104.

+1 cc to Mr.R. Karthikeyan, Advocate Sr.NO. 69512

CrI.A. No.496 of 021

SVI(CO)

A.SK(07.01.2022)